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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,
Plaintiff and Respondent,
v.
WARREN KEVIN CHARLES,
Defendant and Appellant.

A103306
(Alameda County
Super. Ct. No. CH31143)

A jury convicted Warren Kevin Charles of first degree burglary. The court found that allegations of Charles's prior convictions were true, and sentenced him to a term of 40 years to life (25 years to life under the Three Strikes law, plus a 15-year enhancement for priors).

On appeal, Charles claims (1) the trial court's curative instruction regarding his outburst during trial was improper; and (2) the court abused its discretion by denying a motion for mistrial after a police witness made a reference to parole. We affirm.

BACKGROUND

On March 9, 2000, around 10:30 a.m., Thomas Castro was returning from school to the apartment he shared with his sister Laneshia in Hayward. Castro had left that morning for school before 8 a.m.; Laneshia had left for work around 9 a.m. and had locked the doorknob but not the deadbolt. As Castro walked from the parking lot to the staircase leading up to the second-floor apartment, he saw a man descending the stairs with a duffel bag.

As the two passed each other, Castro looked up to see his apartment door open and his stereo sitting on the porch. He realized the duffel bag on the man's arm was his own, and turned to give chase. Castro then reconsidered and slowed down to observe the man get into a car, place the duffel bag in the back seat, and drive off. At one point, the man looked directly at Castro before pulling his car out of the parking place. Castro memorized the license plate number.

There were pry marks on the doorjamb of the apartment. Both bedrooms had been ransacked. Missing items included leather jackets, jewelry, a stereo remote, Castro's duffel bag, and a pillow case. On Laneshia's bed was the jewelry box she usually kept on the dresser. The police found a visible print on the jewelry box. The license plate number Charles gave the police was for a 1995 black Chrysler New Yorker registered to Warren Kevin Charles on Marlow Drive in Oakland.

The next day, the police learned that Charles was living on Pearmain Street in Oakland. Charles was not there, but the police found and impounded his 1995 black Chrysler New Yorker, with plates matching the numbers reported by Castro.

Castro went to the Hayward police station the next day for a photographic lineup. He chose a photograph of Charles as one that "looks like the suspect." When shown the black Chrysler New Yorker, Castro identified the car without hesitation as the one he had seen the day before.

Charles had gone to a friend's house just before the police had arrived on Pearmain Street. He saw the police from his friend's house, and telephoned to say he would turn himself in. He did not. Over 7 months later, on October 22, 2000, Charles was arrested in Oakland.

DISCUSSION

1. The Curative Instruction

After closing argument, as the court began to instruct the jury, Charles interrupted and the following exchange ensued:

"[THE DEFENDANT]: Your Honor, excuse me. Excuse me. I have witnesses that's not been —

“THE COURT: Hang on, sir, Mr. Charles —

“[THE DEFENDANT]: — been brought. I want my witnesses to come forth, and I instruct the jury —

“THE COURT: I’m going to instruct you.

“[THE DEFENDANT]: I’m going to instruct this jury and my attorney, I want the witnesses.

“The COURT: We’re going to take a recess, ladies and gentlemen.

“[THE DEFENDANT]: I want you to bring my witnesses forth.”

Out of the jury’s presence, the prosecutor argued that Charles’ outburst created the erroneous impression that the Court and the District Attorney’s Office were preventing Charles from presenting his witnesses and from testifying. The court said it would admonish the jury, and read a proposed instruction to both parties. Defense counsel stated he had no objection to the admonition. Charles, however, refused to assure the court that he would refrain from further outbursts. The court called for a second deputy and warned Charles that he would be removed “immediately upon this Court’s order.” When the jury was brought back, the following occurred:

“THE COURT: . . . Ladies and gentlemen, I want to go over a number of issues with you, and we’ll start with the instructions in just a minute. First of all, a defendant in a criminal action has a right to be present during all these proceedings. However, a defendant in a criminal action does not have the right to interrupt the proceedings with outbursts or by addressing the jury, unless he’s under oath and unless it is during the process of the trial, during the taking of evidence.

“The taking of evidence has concluded in this case, and it is inappropriate for a defendant in a criminal action at this time to in any way attempt to address the jurors.

“[THE DEFENDANT]: But it shouldn’t be inappropriate for my counsel not to allow me to have my witnesses present. [*Sic.*]

“THE COURT: Please remove Mr. Charles.”

Charles was escorted from the courtroom at this point.

“THE COURT: A defendant in a criminal action has a right to be present during all of the proceedings. However, he does not have the right to interrupt those proceedings.

“During the break, I admonished Mr. Charles that he had a right to be present; however, any outburst, any direction of comments to the Court or to the jury in violation of the admonition would be a waiver of his presence. And, quite frankly, that’s the only way to control a criminal trial to prevent inappropriate outbursts, so by what has just occurred, Mr. Charles has waived his presence for the purpose of these instructions.

“I want to go over two other matters that I went over with counsel before I go back to the instructions, and that is, one, that a defendant in a criminal action has a right to testify, if he desires to do so, even over the objections of his lawyer. In this case, Mr. Charles elected not to testify.

“A defendant in a criminal action, however, does not have a right to make strategic decisions as it relates to how to conduct the case, such as which witnesses are to be called and which witnesses are not to be called. There is no constitutional duty that an attorney will conduct a defense of a case according to an individual criminal defendant’s whims or desires, so according to the whims or desires of a defendant in a criminal case.

“You are to disregard any of the statements made by Mr. Charles while the Court was attempting to read the jury instructions. Those statements are not evidence and are not admissible for any purpose. To consider those statements for any purpose would be jury misconduct. Does anyone have any questions as it relates to that?”

The trial court then asked the prosecutor and defense counsel whether they wished to modify or augment the instruction the court had just given. Counsel stated they did not.

Charles claims the curative instruction was not tailored to the circumstances, was punitive, and included improper references to his failure to testify. He acknowledges that defense counsel failed to object, but argues the claim is preserved on appeal under Penal Code section 1259. We disagree.

Penal Code section 1259 provides that an instruction may be reviewed on appeal in the absence of an objection at trial *if* the substantial rights of the defendant were affected. We conclude the curative instruction here did not affect Charles' substantial rights. The only substantial right he identifies that may have been affected by the court's admonition is his right not to have an adverse inference drawn from his exercise of the right not to testify. (*Griffin v. California* (1965) 380 U.S. 609.

Griffin precludes the drawing of an inference from the defendant's silence; it does not bar "a fair response to a claim made by the defendant or his counsel." (*United States v. Robinson* (1988) 485 U.S. 25, 32; *People v. Austin* (1994) 23 Cal.App.4th 1596, 1611-1612, overruled on another point in *People v. Palmer* (2001) 24 Cal.4th 856, 861, 867.) Here, the court's reference to Charles's election not to testify invited no adverse inference. It was plainly intended to and did inform the jury of the limits of Charles's right to control the presentation of testimony at his trial, after Charles's protestations that his witnesses had not been called.

The court's mention of Charles's right to testify, when Charles himself only referred to "my witnesses," may have been influenced by an earlier exchange between Charles and the bench. During a recess, Charles told the court he disagreed with defense counsel's decision not to call his sister as a witness. The court informed him that decisions about calling witnesses are for defense counsel to make. Charles then said he would testify himself, but ultimately changed his mind when the court ruled that his prior convictions would be admissible for impeachment purposes. In any event, the court's comments about a defendant's right to testify were presented in the context of Charles's limited control over the presentation of his defense. The comments were "properly tailored" to fit that context, and were not "punitive" in any significant sense.

Nothing in the admonition affected Charles's substantial rights. Therefore, defense counsel's repeated and explicit acquiescence in the court's comments operated as a waiver of his client's right to complain in this court about the curative instruction.

2. *Denial of the Mistrial Motion*

Officer Dennis Kutsuris testified regarding the photographic lineup shown to Castro the day after the burglary. When the prosecutor asked Kutsuris to identify the envelope containing the photos, Kutsuris answered, “It says, ‘Parolees lineup of Charles.’” Trial counsel moved for a mistrial based on the reference to parole. (The envelope actually read, “Photo Lineup of Parole Leads, Generated 3/10/2000, Lineup of Suspect Charles,” but the court reporter recorded the word “parolees.”) The court denied the motion for mistrial, stating that its observation of the jurors led it to conclude the comment “came in, quite frankly, under the radar” and did not “rise to the level of a mistrial.” Charles contends the denial of the motion for mistrial was an abuse of discretion.

“A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial, is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.” (*People v. Jenkins* (2000) 22 Cal.4th 900, 985-986; see also *People v. Maury* (2003) 30 Cal.4th 342, 434 [denial of motion for mistrial is reviewed under deferential abuse of discretion standard].) Here, as in *People v. Bolden* (2002) 29 Cal.4th 515, the brief reference to parole was “not significant in the context of the entire guilt trial, and the trial court did not abuse its discretion in ruling that defendant’s chances of receiving a fair trial had not been irreparably damaged.” (*Id.* at p. 555.)

Charles relies on *People v. Holloway* (1990) 50 Cal.3d 1098, overruled on another point in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, footnote 1, but that was a far different case. There, a juror learned that Holloway was on parole, but also acquired “extremely prejudicial” information about his prior criminal conduct. (*Id.* at p. 1110.) Nothing of the sort occurred here.

DISPOSITION

The judgment is affirmed.

Parrilli, J.

We concur:

McGuinness, P. J.

Pollak, J.